United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7060 75-7641

To be argued by
SHELDON ENGELHARD

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

P/S

JAPAN AIR LINES COMPANY, LTD.,

Plaintiff-Appellee,

- against -

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO; IAM DISTRICT LODGE NO. 151; FUSAO OGOSHI, individually and as Senior Business Representative of IAM District Lodge No. 151; ROBERT QUICK, individually and as Grand Lodge Representative of IAM: ROLLO SAVINO, GREGORY McLAUGHLIN, WILLIAM WHITBREAD, MAX SUZUKI, TATSUO SHIRAISHI, STANLEY NAGAOKA, YOSHIAKI KARASHIMA, GARY HIROSHIMA and HIROSHI TARUMI, individually and as representatives of a class consisting of all of plaintiff's employees represented by IAM and employed in the United States,

Defendants-Appellants

REPLY BRIEF FOR DEFENDANTS-APPELLANTS
Appeal from the United States District Court for the Southern District of New York

VLADECK, ELIAS, VLADECK & LEWIS, P.C.
Attorneys for Defendants-Appellants
1501 Broadway
New York, N.Y. 10036
(212) 221-2550

SHELDON ENGELHARD
DEBORAH A. WATARZ
ROBERT L. JAUVTIS
Of Counsel

4

To be argued by
SHELDON ENGELHARD

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAPAN AIR LINES COMPANY, LTD.,

Plaintiff-Appellee,

- against -

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO; IAM DISTRICT LODGE NO. 151; FUSAO OGOSHI, individually and as Senior Business Representative of IAM District Lodge No. 151; ROBERT QUICK, individually and as Grand Lodge Representative of IAM: ROLLO SAVINO, GREGORY McLAUGHLIN, WILLIAM WHITBREAD, MAX SUZUKI, TATSUO SHIRAISHI, STANLEY NAGAOKA, YOSHIAKI KARASHIMA, GARY HIROSHIMA and HIROSHI TARUMI, individually and as representatives of a class consisting of all of plaintiff's employees represented by IAM and employed in the United States,

Defendants-Appellants.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the Southern District of New York

---

VLADECK, ELIAS, VLADECK & LEWIS, P.C.
Attorneys for Defendants-Appellants
1501 Broadway
New York, N.Y. 10036
(212) 221-2550

SHELDON ENGELHARD
DEBORAH A. WATARZ
ROBERT L. JAUVTIS
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

PRELIMINARY STATEMENT

Defendants-Appellants (hereinafter referred to collectively as "IAM") submit this Reply Brief in response to the Brief of Plaintiff-Appellee (hereinafter referred to as "JAL").

POINT I

THE APPEAL FROM THE JANUARY 22, 1975 TEMPORARY RESTRAINING ORDER IS NOT MOOT.

JAL argues mootness as a defense to this Court's consideration of the legality of the issuance of the January 22, 1975 temporary restraining order by Judge Robert Ward. Although it is true that the temporary restraining order is no longer in effect (it was dissolved by Judge Ward in his Order Denying Preliminary Injunction) (A. 209)* dated February 21, 1975, this Court can properly consider the issues raised by IAM. Indeed, a determination of these issues is necessary in order for IAM to pursue all claims which it has on the injunction bond in the amount of $50,000 posted by JAL on January 23, 1975. (A. 152)

A. - an injunction, where the behavior sought to be enjoined has been cured or abandoned, but where issues of liability on an injunction bond due to such behavior remain open, a case should not be dismissed as moot. See Meyers v. Jay Street Connecting

---

* A. refers to Appendix

Railroad, 288 F.2d 356 (2d Cir. 1961), cert. denied 368 U.S. 828. The Meyers case involved a suit to enjoin a railroad and four of its officers from discontinuing service until certain documents and authorizations were issued by the Interstate Commerce Commission. An injunction had been granted by the District Court. The plaintiff raised the defense of mootness before the Court of Appeals because, in the intervening time, the Interstate Commerce Commission had authorized the discontinuance of service. The defendants argued against dismissal for mootness because a determination of the appeal would encompass issues necessary to establish liability on injunction bonds posted by plaintiff.

As to those arguments, this Court responded as follows:

> "The question presented is whether the requirement of Article III of the Constitution that there be a 'case' or 'controversy' is satisfied by the possibility that the issue now before us will, if we dismiss the appeal as moot, arise again in a suit upon the bond. Clearly, the Constitutional requirement that the facts be fully developed so that the court will avoid formulating a vague rule of law without the focus provided by a concrete set of facts to which it will apply has been met in this case. ... The more doubtful question is whether the bond ensures that the parties will be sufficeintly adverse and sufficiently interested in the outcome to satisfy Article III. We believe that it does.
> (At pp. 358-359.)
>
> * * * * *
>
> "We are confident that the bond guarantees the parties' vigorous participation in this appeal. To dismiss it as moot would be formalistic to an extreme and we therefore turn to the merits."
> (At p. 360.)

Similarly, in American Bible Society v. Blount, 446 F.2d 588 (3d Cir. 1971), the Third Circuit reversed a District Court's dismissal of an action as moot where, after issuance of a preliminary injunction, the conduct which the action sought to enjoin had been remedied and where there was a strong likelihood that the appellants would institute suit on an injunction bond. Neither Meyers nor American Bible Society required that any damage be proven prior to the institution of the action on the bond.

By reason of these decisions, the IAM has processed its appeal from the issuance of the temporary restraining order on January 22, 1975. An Undertaking on Injunction was issued by Globe Indemnity Company on January 23, 1975 (A. 152), pursuant to the District Court's order requiring the posting of security. The bond, by its terms, undertook to:

> "... pay to the said defendant INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, et al so enjoined, such costs and damages not exceeding the sum of Fifty Thousand ($50,000.00) Dollars as it may sustain by reason of the injunction, if the Court shall finally decide that the Plaintiff is not entitled thereto ..."

In the present case, the IAM intends to enforce its rights in an action on that bond.

The prerequisite for the IAM to recover on the bond requires that a court "finally decide" that JAL was not entitled to the temporary restraining order. There is no such final determination on record.

The most fundamental question, whether or not the Norris-LaGuardia Act applies, must be answered by this Court, since the provisions of §7 of that Act concerning recoverable damages differs in language and application from the provisions of Rule 65 of the Federal Rules of Civil Procedure.

The interests of judicial economy also caution against dismissal for mootness of the appeal from the temporary restraining order. Although JAL has not docketed an appeal from Judge Ward's denial of their application for a preliminary injunction, they do not concede the impropriety of the issuance of the temporary restraining order. It follows that if this Court does not rule on the propriety of the temporary restraining order at the present time, the same issues will be brought before it on yet another appeal from the action on the injunction bond.

B. Unless this Court determines that the issue is not moot with respect to the issuance of the temporary restraining order, any party relying upon this Circuit's decision in Pan American World Airways v. Flight Engineers International Association, 306 F.2d 840 (2d Cir. 1962) [discussed in IAM's Brief, pp. 10, 12, 14, 29] would necessarily risk contempt in order to test the validity of such order. Clearly, if a contempt order is appealable (Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423 (1974)), the underlying court order, too, must be appealable. Any other conclusion would invite

a party to be contumacious of a court's order as the only means to remedy what may otherwise be an erroneous decision by the lower court.

For these reasons, this Court should entertain and decide the issues raised by IAM concerning the temporary restraining order.

POINT II

JAL HAS FAILED TO CONSIDER SEVERAL IMPORTANT FACTORS IN ITS DISCUSSION OF IAM'S "SCOPE" DEMANDS.

1. JAL has ignored the fact that the employees represented by IAM are ready, willing and able to perform [illegible] jobs subcontracted at various airports. They are currently [illegible], for example, at JAL's Honolulu location. (A. 34, 373) In citing Puerto Rico Telephone Company v. NLRB, 359 F.2d 983 (1st Cir. 1966) [JAL Brief, p. 37], JAL fails to note that there were no bargaining unit employees capable of performing the work being subcontracted. Unlike Puerto Rico Telephone, the subcontracted work can be performed by members of the bargaining unit and some of it has been actually performed at certain locations. (A. 34)

It is also necessary to distinguish the facts of Riverton Coal Co. v. United Mine Workers of America, 453 F.2d 1035 (5th Cir. 1972) [JAL Brief, p. 41], since the questionable union demands in that case were directed to certain third parties, namely, suppliers

who were being boycotted, not the primary employer. Any nexus between the demands of the union and the employer was therefore remote. In the instant case, the IAM demands are directed at the primary employer, JAL, and to work under its jurisdiction. There is no demand for job titles not presently within the existing agreement as there was in Riverton.

2. Contrary to the arguments of JAL, elimination of subcontracting would not result in a change in the scope of JAL's enterprise. What would result is a redistribution of work from subcontractors to the IAM bargaining unit. Furthermore, little weight should be given to JAL's arguments on this subject, since the testimony on the capital expenditures required to meet IAM's scope demand was withdrawn by JAL at trial. (A. 286) Despite the lack of testimony, in at least four instances JAL refers to that element in its Brief. [JAL Brief, pp. 43, 44. 48, 55]

3. JAL has failed to bring to this Court's attention an important factor in cases they cite, General Motors Corp., International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. NLRB, 470 F.2d 422 (D.C. Cir. 1972) [JAL Brief, p. 48] and Northeast Airlines, International Association of Machinists and Aerospace Workers v. Northeast Airlines, 473 F.2d 349 (1st Cir. 1972) [JAL Brief, p. 44]. In those cases, the business decisions found not to be bargainable involved changes in the

ownership structure of the companies -- a merger in Northeast Airlines and a franchise arrangement in General Motors Corp. No such factor is at issue here. Surely it should be acknowledged that a decision to change the legal entity of an enterprise is altogether different from subcontracting or not subcontracting work. Other decisions cited by JAL which are inapposite are Triplex Oil Refining Division, 194 NLRB 500 (1971) and Detroit, Toledo & Ironton R.R. v. Brotherhood of Locomotive Engineers, 74 LRRM 2727 (E.D. Mich. 1969) (not officially reported).

4. JAL's attack upon IAM's arguments as to prior bargaining history between the parties over "Scope" deserves some comment. JAL has decided to eradicate, for the purposes of this proceeding, its previous negotiations and agreements with IAM regarding Scope. JAL demonstrates a mistaken view of the negotiation process by arguing that an agreement reached with the aid of a mediator's proposal is not an agreement at all. [JAL Brief, p. 51] JAL cannot seriously mean to imply that a mediator's suggestions for a solution of a problem is not part of the negotiation process.

5. In light of JAL's attempt to belittle the impack of the subject matter of the Scope proposal on employees' conditions of employment, IAM must reemphasize the importance of Scope to the job security of JAL employees. The spectre of layoff has been constantly with IAM. The announcement of layoffs in Honolulu in

1974 and their subsequent withdrawal only after the commencement of legal action instituted by the IAM is evidence that the threat of layoff is real. JAL argues, on the one hand, that the existence of the no-furlough agreements negates any impact that IAM's arguments may have concerning the importance of potential layoffs. However, on the other hand [footnote, JAL Brief, p. 54], they acknowledge that JAL insists that such layoffs were permitted by the collective bargaining agreement. It is for this very reason that the IAM formulated its Scope proposals, the implementation of which would reduce the impact of any layoff by providing jobs into which laid-off bargaining unit employees could transfer. (A. 374-380)

6. IAM has never stated, as JAL implies [JAL Brief, pp. 39-40] that it is bargaining on behalf of employees who are not yet hired. IAM has always taken the position that the impact of the Scope demand is directed to the employees it currently represents. This fact makes inapposite JAL's reference to Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) [JAL Brief, p. 39], as that case raised the question of whether benefits for retired employees are a mandatory subject of bargaining. In the instant case, IAM's arguments are directed towards the impact on active employees of threats to their job security. If as a result of implementation of IAM's demand there is an increase in the number of employees, this is a side effect only and in no way the focus or purpose of the Scope demands.

POINT III

JAL ERRONEOUSLY ARGUES THAT THE REQUIREMENTS OF §7 OF THE NORRIS-LaGUARDIA ACT CAN BE IGNORED.

In light of JAL's assertion that §7 of the Norris-LaGuardia Act is inapplicable to the issuance of injunctions in labor disputes, IAM reemphasizes this Circuit's decision in Emery Air Freight Corp. v. Local Union 295, IBT, 449 F.2d 586 (2d Cir. 1971), cert. denied 405 U.S. 1066, which is relegated to a footnote by JAL. [JAL Brief, p. 64] The District Court cases cited by JAL, as well as the rulings of any other Circuits, insofar as they conflict with this Court's opinion in Emery, must be subordinated to the principles embodied in that decision. In Emery, this Court specifically stated that the procedural requirements set forth in §7 of the Norris-LaGuardia Act are still alive and well in the Second Circuit. This makes good sense, as the Norris-LaGuardia Act itself, contains both a prohibition against injunctions in labor disputes and procedural requirements which must be met if an injunction is to be issued.

Also, while other statutes have caused inroads to be made into Norris-LaGuardia's prohibitions against issuance of injunctions in labor disputes, there are no statutes which deal with the procedural requirements which still must be satisfied before an injunction may be issued. Only Rule 65 of the Federal Rules of Civil Procedure covers the same subject matter, and that Rule (not

subject matter, and that Rule (not an Act of Congress) specifically provides, in 65(e), that "these rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee."

As this Court clearly stated in Emery:

> "...[I]t is helpful to pause to examine the current vitality of some of the provisions of the Norris-LaGuardia Act, 29 U.S.C. §101 et seq., since appellants rely upon that Act heavily. Only a few months ago, in New York Telephone Co., supra, we had occasion to scrutinize the Act. We pointed out, 445 F.2d at 49, that the 'generality' of injunctions issued in labor disputes had been 'one of the chief abuses that led to the Norris-LaGuardia Act.' We emphasize that the Act still applies to all labor disputes in which a federal court can issue an injunction, that nothing in Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970), is to the contrary, and that although that decision allows an employer injunctive relief in a labor dispute, such relief is 'limited to vindicating the arbitration process. See Note 71, Column L. Rev. 336, 342-44 (1971).' Id. Thus, before an employer in a dispute with a union can obtain an injunction, there are a number of conditions to be satisfied. Section 7 of the Act, 29 U.S.C. §107, lists a good many of them, including the requirements that a temporary restraining order 'shall be effective for no longer than five days' and that such an order should not be issued except upon 'testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice,' ..." (At 588)

The IAM believes that the above quotation is dispositive of the issue.

CONCLUSION

Based upon all the foregoing, IAM submits that the District Court's order granting the temporary restraining order on January 22, 1975 should be reversed, along with the final declaratory judgment which declared "Scope" to be a non-mandatory subject of bargaining under the Railway Labor Act.

Dated: New York, N.Y.
March 26, 1976

Respectfully submitted,

VLADECK, ELIAS, VLADECK & LEWIS, P.C.
Attorneys for Defendants-Appellants
1501 Broadway
New York, N.Y. 10036
(212) 221-2550

Sheldon Engelhard
Deborah A. Watarz
Robert L. Jauvtis
Of Counsel

Date PLAINTIFF
3/26/76
Time 2:30 P.M.